



Paul R. LePage  
GOVERNOR

STATE OF MAINE  
OFFICE OF THE GOVERNOR  
1 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0001

February 27, 2017

**Via overnight Fed Ex and email**

Mr. Scott Pruitt, Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue  
Mail Code: 1101A  
Washington D.C. 20460  
[Pruitt.scott@Epa.gov](mailto:Pruitt.scott@Epa.gov)

Re: *Petition for EPA's partial withdrawal of EPA letter actions and repeal of EPA's final rule on Maine's water quality standards*

Dear Mr. Pruitt:

Attached is a Petition for the reconsideration and withdrawal, with one important exception, of three EPA letter actions on Maine's water quality standards, and the repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016). Also attached in support of this Petition are comments by the Maine Attorney General and the Maine Department of Environmental Protection on the proposed version of EPA's final Maine rule, as well as a copy of Maine's Second Amended Complaint filed in *Maine v. McCarthy, et al.*, currently pending in the United States District Court for the District of Maine, No. 1:14-cv-00264-JDL. I hope that you give this Petition the serious consideration it deserves.

Sincerely,

Paul R. LePage  
Governor, State of Maine



## PETITION TO THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Petition for EPA's reconsideration and withdrawal of all portions of EPA's letter actions dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, and repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016)

Submitted February 27, 2017, to the Administrator, U.S. Environmental Protection Agency

The State of Maine, through Governor Paul R. LePage, submits this petition to the Administrator of the U.S. Environmental Protection Agency ("EPA") pursuant to 5 U.S.C. § 553(e) for the following actions: 1) reconsideration and withdrawal of all aspects of EPA's letter actions and supporting rationale regarding Maine's water quality standards dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, including in Indian waters and lands; and 2) repeal or withdrawal of EPA's final rule entitled Promulgation of Certain Federal Water Quality Standards Applicable to Maine, 81 Fed. Reg. 92466 (Dec. 19, 2016) ("Maine Rule").

In support of this request, and in addition to the following Supporting Statement, attached are copies of comments previously submitted to EPA by the Maine Attorney General and the Maine Department of Environmental Protection on the proposed version of EPA's Maine Rule, as well as a copy of Maine's Second Amended Complaint filed in *Maine v. McCarthy, et al.*, which is currently pending in the United States District Court for the District of Maine, No. 1:14-cv-00264-JDL. These attached materials more fully outline the nationally unique tribal-state relationship that exists between the State of Maine and the four federally-recognized Maine Indian tribes as a result of Maine's state and federal Indian settlement acts, including the state Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* ("MIA") and the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq.* ("MICA")<sup>1</sup> (collectively the "1980 Acts"). The materials also more fully outline the history in recent years of EPA's failure to recognize Maine's role as a state under the Clean Water Act ("CWA") and under the unique jurisdictional principles contained in the 1980 Acts.

Because this matter is also the subject of currently pending litigation, the following Supporting Statement describing the rationale for Maine's request to EPA is relatively brief. For a more in-depth discussion of background, Maine's positions, and the intricacies of Maine's

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<sup>1</sup> MICA was formerly codified at 25 U.S.C. §§ 1721-1735. MICA and other settlement acts remain in effect but were removed from the United States Code as of 25 U.S.C. Supp. IV (September 2016) in an effort by codifiers to improve the code's organization.



unique tribal-state jurisdictional arrangement under the 1980 Acts, Maine invites EPA to follow up this Petition with a meeting with the members of the Office of the Maine Attorney General representing Maine in the pending litigation with EPA.

### **MAINE'S SUPPORTING STATEMENT**

Under Maine's nationally-unique 1980 Acts, Maine has statewide environmental regulatory jurisdiction and authority, including in all Indian waters and lands, which was confirmed by the First Circuit Court of Appeal in the context of water regulation in *Maine v. Johnson*, 498 F.3d 37 (1<sup>st</sup> Cir. 2007).

Under the CWA, states like Maine must establish water quality standards ("WQS") for all surface waters, including designating the uses of all such waters and establishing water quality criteria designed to protect the state's designated uses. In 1986, Maine adopted a new and comprehensive water classification program, now codified at 38 M.R.S. §§ 464-470, which contained all of Maine's designated uses and other WQS for its waters, and which EPA fully approved by 1990 without ever suggesting that Maine's WQS in that program did not apply or were not fully in effect in Indian waters for CWA purposes. By law, under both the CWA and EPA's regulations, those approved Maine WQS became the WQS in effect for CWA purposes for all applicable Maine waters at that time, including Maine's Indian waters. Indeed, for decades prior to 2005, EPA consistently applied Maine's WQS in Indian waters for CWA purposes, which also created significant reliance interests on the part of the regulated community.

In late 2004, however, Maine sought review in the First Circuit Court of Appeals of an EPA decision that Maine had no jurisdiction to regulate certain discharges of pollutants from two tribal wastewater treatment facilities. In *Maine v. Johnson*, the First Circuit concluded that EPA was wrong and that Maine did have such jurisdiction. Under the 1980 Acts, Maine's environmental laws on water quality, including its WQS, apply in Indian waters to the same extent as in other waters, and EPA cannot require that tribal members be treated differently than the rest of Maine's citizens for any environmental regulatory or water quality purposes. Congress reaffirmed this core principle of the 1980 Acts in 1987 when it first added tribal provisions to the CWA, but expressly stated that the new CWA tribal provisions would not apply in Maine for regulatory purposes because of the 1980 Acts.

Also in 2004, and as Maine pursued its appeal in the *Maine v. Johnson* matter, EPA began limiting its approvals of Maine's WQS revisions to non-Indian waters only while taking no action for an unspecified set of Indian waters. EPA later suggested that Maine's already-EPA-approved WQS that had been governing Maine's Indian waters for decades had never actually been in effect for any CWA purposes. The implication of this EPA reversal in position was that, under EPA's new thinking, a total water regulatory void existed in all of Maine's Indian waters, which was in violation of Congressional directives in the CWA and EPA's own regulations, guidance, and past application of Maine's WQS in Maine's Indian waters. EPA's change in position also disrupted decades of settled expectations regarding the Maine regulatory structure in those areas.



Faced with this new unsettling EPA approach, Maine originally filed its federal legal action in the District of Maine in 2014 to get EPA to honor Maine's statewide regulatory jurisdiction and to approve all of Maine's outstanding WQS for Indian waters. Maine expected this to happen, especially given that even EPA now agrees that Maine has statewide regulatory jurisdiction and authority over all its waters, including Indian waters. In response to Maine's action, however, EPA did something unexpected when it issued its February 2, 2015 letter, which generally does two things. First, EPA belatedly but correctly acknowledged Maine's statewide environmental regulatory jurisdiction and authority to set WQS for all Maine waters, including Indian waters, which EPA was effectively required to do under the 1980 Acts and *Maine v. Johnson*. Maine is not asking for EPA to reconsider or withdraw this portion of EPA's February 2, 2015 letter.

But then, in a surprising end-run of *Maine v. Johnson*, the plain language of the 1980 Acts, and CWA procedural requirements, EPA's February 2, 2015 letter also disapproved various Maine WQS (Maine's human health water quality criteria) for unspecified Indian waters based on a complex and convoluted new rationale that Maine is challenging in the District of Maine litigation, and that Maine is now asking EPA to fully reconsider and withdraw here.<sup>2</sup> In this portion of EPA's February 2, 2015 letter, EPA claims for the first time that in exercising its jurisdiction, Maine must ensure through new and heightened tribal-specific WQS that fish in Indian waters are of sufficient quality for tribal members to subsist on at consumption levels derived from historical reconstructed estimates taken from ethnographic accounts from the 16<sup>th</sup> through 19<sup>th</sup> centuries. EPA also now claims that its decades-long prior acceptance and consistent application of Maine's WQS throughout Indian waters were all mistakes.

EPA arrived at this remarkable change in position by newly and incorrectly interpreting (in 2015) the 1980 Acts as implicitly creating a new designated use of tribal sustenance fishing for Maine's Indian waters, even though Maine's water program contains no such use. The Maine Legislature, which has sole authority to make changes to Maine's water classifications and designated uses of its waters, 38 M.R.S. §§ 464(2)(D), 464(2-A)(E), never created such a sustenance fishing use, but actually considered and rejected a controversial 2002 proposal to create a similar "subsistence" designated use for limited portions of the Penobscot River only. The new sustenance fishing designated use is entirely a creation of EPA based on its new and incorrect 2015 interpretation of Maine law.

EPA's 2015 creation of a new designated use of tribal sustenance fishing for Maine is also based on a convoluted new interpretation of the 1980 Acts and other Maine Indian

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<sup>2</sup> Maine is also asking EPA to reconsider and withdraw two additional subsequent letters regarding Maine's WQS dated March 16, 2015, and June 5, 2015, which EPA issued as a result of Maine's original federal action. The March 2015 letter contains some EPA tribal WQS disapprovals, as well as some non-tribal components, while the June 2015 letter contains EPA actions primarily involving non-tribal WQS. Maine asks that all three letters be reconsidered and withdrawn, in addition to the repeal of EPA's resulting Maine Rule, so that the unlawful tribal components of EPA's various actions can be undone, and so that Maine can consult with EPA to find reasonable, mutually agreeable approaches to the remaining non-tribal WQS issues outside of the adversarial context of ongoing federal court litigation to protect Maine's jurisdiction under the 1980 Acts.



settlement acts that turns those acts and the intent of Congress on their head by establishing different WQS requirements for Maine's Indian tribes than for other Maine citizens – the very thing that the 1980 Acts were designed to avoid. EPA's new interpretation is also contrary to Congress' subsequent statement that the CWA's tribal provisions do not apply in Maine for regulatory purposes because of the 1980 Acts. Moreover, by creating a new designated use of sustenance fishing for Maine, EPA has usurped Maine's role as a state under the CWA, which reserves the function of designating the uses of state waters to the states. EPA also did all of this without following CWA procedural requirements regarding the creation of new WQS such as a new designated use.

EPA began quietly pursuing this new revised approach to Maine's WQS around 2004 in order to further separate tribal environmental goals pursuant to EPA national tribal policies that were developed after 1980 and that do not apply in Maine under the 1980 Acts. Since EPA's change in position around 2004, EPA has increasingly been working on important Maine water quality issues with Maine's Indian tribes, who have no environmentally regulatory authority in Maine under either the CWA or the 1980 Acts, while excluding the State of Maine, which has full statewide environmental regulatory authority over all waters. This has unfortunately created discord and tension in Maine and has strained relationships with EPA and the Maine tribes.

EPA's new approach to WQS in Maine is also similar to EPA actions in other states such as Washington and Idaho. The common features of EPA's recent actions in Maine and other states include new EPA requirements when states develop WQS that intrude on state policy decisions and generally eliminate state discretion, such as forcing states to use higher cancer risk levels and aspirational unsuppressed fish consumption rates for tribes. In Washington, as in Maine, EPA has created new tribal-specific federal designated uses through new EPA interpretations of existing state WQS laws, and has reformulated the states' chosen "target" populations of such designated uses based on the new EPA interpretations. The CWA requires that any federal WQS be created through rulemaking – not through new EPA interpretations of state law, which sidesteps CWA legal requirements. All of these EPA intrusions into traditional state matters are contrary to the CWA's principles of cooperative federalism and EPA's existing guidance, and represent an increasingly federalized regulatory approach to state waters.

Reconsideration and withdrawal of EPA's three letters at issue here and EPA's final Maine Rule (with the exception of EPA's long overdue acknowledgement of Maine's statewide environmental regulatory jurisdiction and authority) will honor clear Congressional and Maine legislative intent regarding Maine's unique tribal-state relationship, restore Maine's state role over the planning and management of its waters, and hopefully represent a positive first step start towards improved working relationships with EPA and the Maine Indian tribes.

### CONCLUSION

For the reasons described above, as well as in Maine's Second Amended Complaint and various comments submitted on EPA's Maine Rule, Maine respectfully requests that EPA 1) reconsider and withdraw all aspects of EPA's letter actions dated February 2, 2015, March 16, 2015, and June 5, 2015, with the exception of EPA's recognition of Maine's statewide environmental regulatory jurisdiction and authority, including in Indian waters and lands; and 2) repeal or withdraw EPA's final Maine Rule.

Dated this 27 day of February, 2017.

A handwritten signature in black ink that reads "Paul R. Lepage". The signature is written in a cursive style with a large, stylized "P" and "L".

Paul R. Lepage  
Governor, State of Maine